The Central Law Journal.

SAINT LOUIS, JANUARY 10, 1879.

CURRENT TOPICS.

The Supreme Court of Tennessee, in the case of *Staub v. Williams*, have lately ruled upon an important question as to appeals in chancery, in attachment cases. A defendant, whose land had been attached, appealed from the decree of sale and gave an appeal bond for costs only, under the act of February 1, 1871, ch. 106, which provided that, in all cases in which real estate was, by a decree of a court of equity, ordered to be sold, the owner of the real estate appealing to the Supreme Court should "be required to execute a bond in an amount sufficient to pay the costs of the cause in the court below, and in the Supreme Court." In the appellate court an order was made that the appellant should give bond for the entire debt covered by the decree of sale, under the statute (code, § 3164,) which provides that, in all cases of appeals from chancery decrees for the payment of money, the appeal bond should cover "the amount of the decree, damages and costs." The court overruled a motion to rescind this order, COOPER, J., in his opinion, exhibiting his accustomed familiarity with the fundamental principles of equity jurisprudence. "Obviously," said he, "in this, as in other cases of statutory construction, we must look beyond the mere letter of the law, to the real intent of the legislature. The best mode of arriving at that intent, is to ascertain the evil of the pre-existing law, which the act was intended to remedy. Originally, equity had no jurisdiction to give judgment upon notes of hand, even as an incident to the exercise of acknowledged juris diction, the remedy being plain at law. Thus, upon a bill to enforce a vendor's lien for the purchase notes of land, or to foreclose a mortgage of realty by sale, the rule was to sell the land, leaving the complainant to sue at law for any part of his debt not satisfied by the proceeds of sale. Afterwards, either by statute as in New York, by rule of court, as in the courts of the United States, or by usage, as in this State, it became the practice to render a judgment for any balance of the debt. In this State, under our legislation, it had become the rule to render judgment for the whole debt in advance of the sale. (*e. g.*, see Mitchell v. McKinny, 6 Heisk. 85.) In this condition of the law, it was obviously a hardship to require security for the entire debt upon appeal, for the complainant had already the security of the property, a security recognized as sufficient by the terms of the contract in most instances. The statute (of 1871) was intended for this class of cases." And it was said that the legislature could not be supposed to have intended to extend that statute to cases of at tachments of land, because in such cases the value of the land is frequently less than the creditor's demand, and a bond for costs alone would be inadequate; and because such a construction would require a different bond in equity from that required at law in the same class of cases.

IN *Fletcher v. Rodgers*, 27 W. R. 97, the plaintiff and defendant were members of two firms in Liverpool, and a dispute having arisen between them in which damages were claimed, the defendant seized one of the plaintiff's vessels lying at San Francisco. The plaintiff, thereupon, applied to the English Court of Chancery for an injunction, which was granted, restraining the defendant from proceeding in the foreign court. On appeal to the Court of Appeal the order granting the injunction was set aside. JAMES, L. J., said: "I am of opinion that this order is improperly made, and that there are no authorities on which it can be maintained. The case is simply this: There are two persons, partners of firms in Liverpool, between whom there is a contest as to the amount of damages, if any, due from one to the other. The plaintiff, by reason of having certain property in San Francisco, is, by the law of that country, within its jurisdiction, and any one who has a claim against him and proposes to try it in San Francisco, may say: 'I intend to try my claim there, and to avail myself of the property which is there, and which the law of the country gives me leave to seize.' Either he has a legal right according to the law of San Francisco, to bring an action there, and to avail himself of the power of seizing the property there, or he has no such right. If he has a legal right to pro-

ceed in that court, I am at a loss to see what equity there is to restrain him from bringing his action and trying it there, or from availing himself of the particular law of that court enabling him to seize such property, more than there would be for that court to restrain any admiralty proceedings of this country. If he has a legal right to bring his action, the courts there will administer the law with justice, and we must not assume that that is not as much the case there as here. If he has not a legal right the courts there will say so. The only real ground for this order is that it is more convenient for the plaintiff that the action should be tried here, and that it is, as he alleges, undue pressure, *mala fides*, and against justice that he should be made to try the action there. Why is it so for a man to select the court in which to try his own action? The courts of this country have no right to interfere with proceedings in another country, merely because they, praising themselves, choose to say: 'We will administer the law better, and do more justice than the other court will.' We have no more right to grant an injunction restraining proceedings in San Francisco on those grounds, than the court of San Francisco would have to restrain proceedings in our courts upon the same grounds. Courts must respect each other." BRETT and COTTON, L. J. J., concurred, the former adding: "I doubt if the seizure alone gave that court jurisdiction, but I will assume such to be the case, and that, by the law of California, if property be in that country it may be seized, and thereupon jurisdiction is founded. I do not think anything has been done contrary to natural justice; for what is there contrary to natural justice in a person taking advantage of the law? It is said it is contrary to good faith; but what contract or rule of conduct is there which says to the defendant that it is contrary to good faith between the plaintiff and you that you should take advantage of the law of California, which in itself is not contrary to natural justice? I fail to see any. Then it is said it is inconvenient. To whom? It is inconvenient to the plaintiff, but not to the defendant. It would be most inconvenient to the defendant if he were not to be allowed to take advantage of a law which is not contrary to natural justice nor contrary to good faith. Is it oppressive? No doubt in one sense it is; but not in the sense of lega oppression."

THE principle of law, that one voluntarily entering a dangerous service knowing the danger, assumes himself all the risk of the employment, was applied in *Kelley v. Silver Spring Co.*, recently decided by the Supreme Court of Rhode Island to a case where the danger arose after the employment commenced, but the party continued in it without complaint. The plaintiff was employed to tend a machine in a dye-house, the gears of which were covered with boxing. Some time before the injury occurred, a part of the boxing was broken away rendering the liability to be caught in the gearing very great. The plaintiff applied to the defendant's agent to have it repaired which was refused, whereupon the plaintiff contrived a temporary protection of his own and continued in his work. Shortly after, he was injured and brought suit therefor. The court held that he could not recover. See Holmes v. Clarke, 6 H. & N. 49; 7 H. & N. 937; Holmes v. Worthington, 2 Fost. & F. 533; Patterson v. Pittsburgh & Connellsville Railroad Company, 76 Pa. St. 389; Kroy v. Chicago, R. I & P. Railroad Company, 32 Iowa, 357. The case of Sullivan v. India Manufacturing Company, 113 Mass. 396, closely resembled the case at bar. There a boy of fourteen was caught in the gearing of a machine near which he was employed. The court ruled that if he had such instruction or knowledge as would enable him with reasonable care to do this work with safety the defendant would not be liable, no matter where the knowledge was obtained. On motion for a new trial, after verdict for the defendant, the court thus stated the law: When the employee "assents to occupy the place prepared for him and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might, with reasonable care and by reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no ground of complaint, even if reasonable precautions have been neg-

lected." In Sullivan's Administrator v. Louisville Bridge Company, 9 Bush, 81, the plaintiff's intestate fell from a narrow plank erected over a river where he and others were engaged to pass stones for the construction of a bridge. It appeared that he and others had hesitated before the accident about going on the plank, but being told to do it or go home, had done it, and falling into the river was drowned. The court refused to disturb a verdict for the defendant, upon the ground that he had voluntarily taken the risk. In Ladd v. New Bedford Railroad Company, 119 Mass. 412, the plaintiff, an employee of the corporation, was riding in a railway car which was thrown down a bank. One cause of the accident was alleged to be a want of check-chains. But it appeared by the testimony of the plaintiff, who had long been in the employ of the corporation, that he knew that some of the trains were without check-chains, and had said they were not safe. It was held that he was not entitled to recover for the injury he had received, on the ground that he had voluntarily taken the risk. In Dillon v. Union Pacific Railroad Company, 3 Dill. 320, the plaintiff, who was a locomotive engineer, was put in charge of an engine which had no signal bell, and the court held that he was not entitled to recover for an injury which he claimed to have suffered in consequence, because he knew when he took service on the engine that it had no signal bell. See also, to the same effect, Ogden v. Rummens, 3 Fost. & F. 751; Dynen v. Leach, 26 L. J. (N. S.) Exch. 221; Gibson v. Erie R. R. Co. 63 N. Y. 449. This rule is not rigidly enforced against persons who are too young or too ignorent to appreciate the dangers to which they are exposing themselves; Coombs v. New Bedford Cordage Company, 102 Mass. 572; Grizzle v. Frost, 3 Fost. & F. 622; Laning v. N. Y. Central R. R. Co. 49 N. Y. 521; Hill v. Gust, 55 Ind. 45; and especially if the employer permits the danger to exist in violation of the statute law. Britton v. G. W. Cotton Co. L. R. 7 Exch. 130.

Mr. Gerald Fitzgibbon, Q. C., the Solicitor-General for Ireland, has been appointed Lord Justice of Appeal, in room of Lord Justice Christian, resigned. Mr. Fitzgibbon, who is in his forty-ninth year, took his degree in 1859, was called to the bar in 1860, rose rapidly in his profession, and was made Queen's Counsel in 1872.

THE SIXTH VOLUME OF THE "AMERICAN DECISIONS."

Within a year from the commencement of the publication of the American Decisions, the sixth volume appears. It contains the decisions of eleven States, taken from seventeen volumes of reports, and extending over three years, from 1812 to 1815. The reports which supply the leading cases in this volume are 9 & 11 Johns. (N. Y.); 5 & 6 Binney (Penn.); 3 Harris & Johnson (Md.); 4 Munford (Va.); 1 & 2 North Carolina Law Repos.; 3 Brevard (S. C.); 3 Bibb. (Ky.); 3 & 4 Martin (La.); and 1 D. Chapman (Vt.). From the two hundred cases which are here presented, the following deserve attention:

In *Phillips' Academy v. Davis*, 11 Mass. 113, a number of subscriptions having been made by various persons, for the erection of an academy, the legislature subsequently incorporated certain trustees, and, in the act of incorporation, provided that all moneys subscribed should be received and held by such trustees in trust for the academy. It was held that the corporation could not maintain assumpsit upon this agreement against one of the subscribers for the amount subscribed by him. *Holden v. James*, 11 Mass. 396, is to the effect that the legislature has no power to suspend the operation of a general law in favor of an individual. In *Dupy v. Wickwire*, 1 D. Chapman, 237, the Supreme Court of Vermont held that an act of the legislature, directing a certain deposition to be read on the trial of a cause then pending, was void.

Amory v. Flyn, 10 Johns. 102, decides that a finder of property has no right to a reward from the owner—all that he is entitled to is to be paid the expenses incurred in its preservation. *Moore v. Fox*, 10 Johns. 244, is a case under the statute of frauds. The defendant agreed to pay a minister for his services two dollars a year, and had for several years paid the sum half-yearly. Subsequently he refused to pay any longer. The promise was held not to be within the statute. In *Dole v. Lyon*, 10 Johns. 447, Chief Justice Kent holds that the publisher of a libel is liable to an action by the party libeled, notwithstanding the libel is accompanied with the name of the author. In *State v. Yancy*, 1 Car. Law Repos., it is held that a person may be indicted for an assault committed in view of the court, though

previously fined for the contempt, the same act constituting two offenses, one against the court and one against the public peace, and, therefore, the plea of *autrefois convict* is not available. In *Smith v. Mayo*, 9 Mass. 62, an infant who had given his promissory note for value, but not for necessaries, paid a part of it when he became of age, and afterwards made a will in which he directed his "just debts" to be paid. In a suit on the note against the executors, the latter had judgment. The Supreme Judicial Court said: "We can not consider the expression in this will as amounting to such a promise. It was made some time after the testator came of age, and it may have had reference to debts contracted after that period. At any rate it contains a direction to pay only just debts; and there is nothing in the case from which we can infer that, what was not in law a debt, could be considered by the testator as a just debt. There are undoubtedly cases in which persons apparently of man's estate and engaging in business usually transacted by persons of ability to contract, lead unsuspecting creditors into difficulty, and oftentimes into distress; and these cases individually considered wear the appearance of hardship. But the general policy of the principle of law which authorizes an infant to avoid a contract, can not be disputed. The experience of ages has proved its utility. The readiness of young persons to engage themselves in burdensome contracts without sufficient consideration, and of older ones to take advantage of their inexperience, would produce general mischief in the community, did not this wholesome principle interpose to produce a degree of caution in looking to the character of those with whom they deal; and although particular instances of hardship may be lamented, the general policy of the law must be enforced."

We occasionally come across sermons in the reports and the opinion of Breckenridge, J., in *McAllister v. Marshall*, 6 Binney, 458, is one of them. The text is fraudulent assignments, and the discourse is addressed to both creditor and debtor. The reporter in a note explains that the opinion is inserted, not for its value, but as an indication of the unique style of this learned judge, and as showing why his opinions have not thus far been given a place in this series, and we presume will not be again. An insolvent debtor had executed an assignment for the benefit of his creditors, with an understanding that part of the property assigned should be conveyed to trustees for the use of his family. This was held void as to non-consenting creditors. "The following discourse," says Breckenridge, J., in commencing his judgment, "which I have found amongst my papers, would seem to have some bearing on the case before us." He then quotes from St. Luke the parable of the unjust steward, and continues:

"This steward was an insolvent man, who was unable to pay over to his lord the moneys which he had received, and for which he had become his debtor. He cast himself, theretore, about to settle the account in collusion with the debtors of his lord. The lord commended the unjust steward; not, it is to be presumed, because he was unjust, but because he was necessitous. 'He had done wisely,' for that occasion, and not what the children of light would do, but not more wisely for all times than the children of light would do; for I will venture to say his lord would never trust him again

"In our day, and in this generation, the children of this world think themselves wise in defrauding their creditors, and doubtless they exhibit no small share of worldly wisdom in the devices to which they resort to accomplish that object. But, my brethren, I take it there is but a shade of difference in law, and none at all in conscience, between highway robbery and the compelling a creditor to take less than his due at the same time, that by any contrivance, or, as the lawyers call it, shift or chevisance, you save something for yourself."

So far the divine. Would not the moralist say the same thing? For what is religion but morality, with a sanction drawn from a future state of rewards and punishments? Would not the jurist say the same? For what is law but the enforcement of justice amongst men? The *reddere suum cuique* is the definition of justice. Would not the politician say the same? For the happiness of the social state is but an aggregate of individual happiness, and this depends upon the moral rectitude of each one of the community. An honest man may not be able to pay his debts, owing to misfortune, or to disappointment in his calculations. But no honest man or child of light, as the divine would say, would withhold the rag upon his back, or upon that of his child, if the creditor who has a demand against him would insist upon pulling it off. He would not conceal a rag, or annex a condition to the surrender of it, that the creditor should release all further claims on the future rag which he might acquire by his labor and industry in life. But not so with the insolvent debtors. They take the benefit of the act, and make a surrender of their effects upon oath, but there are few instances where there is not reason to suspect that there is concealment in the surrender which they make, and this from the evidence that in most cases they are seen to emerge with sometimes not less and sometimes more than ease of circumstances than before. As the heathen poet says to his mistress it may be said to the insolvent when he has taken the oath: *Simul obligasti perfidum votis caput enitescis pulchrior multo.*

"He is like the chrysalis that has cast its coat and taken wing; it shines away with a splendor which it had not before. In a proceeding toward creditors, independent of an insolvent act, I am unfa-

vorable to the debtor making a bankrupt law for himself. An unconditional surrender of all his effects until his debts are paid, if he surrenders at all, is the only principle that can receive my sanction in a court of justice. There are decisions to the contrary in this court, but it will require a number of decisions by men of different educations and habits of thinking before I can yield to them. If these decisions are founded in nature and truth they will prevail; if not they will go by the board. *Commenta hominum delet dies judicia naturae confirmat.*

"At the same time that I withhold my assent to these decisions, I am far from inculcating an unfeeling disposition toward debtors. I say to the debtor do justice to the creditor, love, mercy and this, is the language of the Scripture. But I hold it the duty of the debtor to surrender himself to the humanity of the creditor, and not to attempt to take an undue advantage of his situation as creditor and to impose terms. And this will be found in the end to be the wisest course for the debtor himself, even with a view to his getting forward again in the world. * * * * For if there were not a generosity in man there is a secret operation of providence which attends and blesses the industry of the honest. It is the language of the Scripture: 'I have been young and now am old, yet have I not seen the righteous forsaken, nor his seed begging bread.'"

Yates v. Lansing, 9 Johns. 395, is a leading case on the liability of judicial officers for judicial acts. Here Chancellor Lansing had committed one of the officers of the court of chancery for malpractice and contempt. Subsequently a judge, in vacation, discharged the officer on *habeas corpus*, and the chancellor again committed him for the same contempt. It was held that he was not liable to an action. The note to this case is very complete, the authorities cited, including the late case of Lange v. Benedict, decided in the same State during the past year. *Jackson v Adams*, 9 Mass. 484, is a somewhat novel case, and concerns the liability of the printer of a newspaper for carelessness in printing an advertisement. The plaintiff delivered to the defendant for publication a notice of sale of an equity of redemption, to take place on the 20th of June. In the advertisement the day set was the 28th of June, and was published in this form three weeks, as aequired by law. The mistake was not discovered until the day of sale, and the purchaser refused to accept a deed. In the meantime the thirty days after entry of judgment, allowed for the sale of the equity of redemption, having expired, it was seized and sold under an execution in favor of another creditor. As to the liability of the printer, the court said: "The undertaking of the defendants in this case being for hire, and in the exercise of their ordinary occupation—that of printing—they must be answerable for any neglect or mismanagement in the performance of their trust, and for any loss or damage which might have been avoided by that degree of care or diligence which their employer had a right to expect and rely upon. If, therefore, the printers were not mislead by the writing of the advertisement delivered to them, as, for instance, supposing it now examinable, if twentieth were not so written as to be mistaken for twenty-eighth, supposing a suitable degree of attention on the part of the compositor, I think the defendants are liable in this action." Further on in the opinion, the nature of the printer's undertaking, and the duty of the employer, are well stated.

"The nature of the printer's undertaking is such as that a minute and perfect transcript of an advertisement delivered to him in writing, or an exact correctness in the first impression, beyond what may be expected from a general care and superintendence of his newspaper, is not to be understood in any contract for printing, where no special caution has been given by his employer, and no special undertaking has been expressed on the part of the printer. When any particular care or attention are requisite, it is the duty of the employer to suggest it, and to guard himself in this respect by cautioning the printer, or requiring a special guaranty of exact or material correctness in the first impression of a particular advertisement. In ordinary cases the printer publishes, relying upon some continued care on the part of his employer, that he will examine and verify the impression, and for that purpose will give notice of and will be attentive to have seasonably corrected any errors of importance, to which the business of composing and printing, even with ordinary care and diligence, is notoriously subject, without requiring an allowance for the hurry, usual perhaps, in printing newspapers applicable to this particular case. The loss of the erroneous impression the printer incurs, and any extraordinary expense to procure another, which he may be exposed to, for so far the employer is protected, even without his corresponding attention, upon which the printer may be supposed to rely."

On the question of the damages recoverable when the advertisement appears in an incorrect form, and the printer is guilty of negligence the court say:

"For accidental and remote consequences which may prove to be, as in this case, losses and damages of a very considerable amount, the risk respecting them not having been notified or stated to him, and of which he has no warning, for these, I think, he is not liable, upon what may be considered within the ordinary untaking implied from the occupation. It is not to be supposed that he undertakes, for the pay of an advertisement, comparative inconsiderable, to have an exact correctness independently of the attention of his employer, and without any special caution or notice, at a risk so very extensive in the amount. And even upon the supposition adopted in the argument that by the delay in publishing the advertisement the opportunity of correcting or renewing it was lost, and all the consequences were inevitable, which, in this case, have been incurred at the expense of the plaintiff,

we can not consider the printers answerable for these damages."

No notice of this volume could be complete without a reference to the large number of cases whose value the industry and learning of the editor has increased an hundred fold. There are eight cases to which notes have been added so complete as to make this volume a digest of the subjects on which they treat. Any one who will examine Mr. Proffatt's annotations to the case of *Dickenson v. Barber*, 9 Mass. 225, concerning opinion evidence; to *Com. v. Neal*, 10 Mass. 152, as to a husband's liability for the torts of his wife; to *Emerson v. Brigham*, Id. 197, as to warranties and the action for deceit; to *Homer v. Wallis*, 11 Mass. 309, upon the question of the comparison of handwriting; to *Selleck v. French*, 1 Conn. 32, on the subject of interest; to *Yates v. Lansing*, *supra;* to *Jones v. Crittenden*, 1 Car. Law Repos. as to the constitutionality of "stay laws," and to *Chardon v. Oliphant*, 3 Brevard, 572, upon the power of a partner after dissolution of the firm, will find sufficient to satisfy him of the accuracy of this statement. Notes less lengthy, but hardly less valuable, are appended to many other cases, viz: *Porter v. Hill*, 9 Mass. 34, as to the inability of a joint tenant to convey his interest in the joint estate by metes and bounds; *Bearce v. Barstow*, 9 Id. 45, as to usury; *Catlin v. Ware*, Id. 218, as to a wife's deed; *Stackpole v. Arnold*, 11 Mass, 27, as to oral evidence to vary writings; *Long v. Calhoun*, Id. 97, concerning signatures by agents; *Phillips Academy v. Davis*, *supra;* *Peck v. Smith*, 1 Conn. 103, as to highways; *Barrett v. Smith*, Id. 334, as to deeds; *Sturtevant v. Ballard*, 9 Johns. 337, as to sales of personalty where the vendor remains in possession; *Jackson v. Matsdorf*, 11 Johns. 91, concerning resulting trusts; *White v. Com.*, 6 Binney, 179, as to indictments for statutory crimes; *Dupy v. Wickwire*, *supra*, and *Milne v. Moreton*, Id. 353, upon the effect of an assignment under a foreign law.

This undertaking, which we have, from the publication of the first volume, recommended to the careful attention of the profession, still continues to merit their confidence. No other work exists, nor is any other likely to appear for many years, in which the lawyer can obtain so complete a collection of the opinions of the American judges from the commencement of American case law down to the present time, and at so moderate a cost, as in the AMERICAN DECISIONS.

MORTGAGEE'S SALE OF REAL ESTATE — DEFECT IN SALE—RIGHT OF INNOCENT PURCHASER.

JOHNSON v. WATSON; NELSON v. WATSON.

Supreme Court of Illinois.

[Filed at Ottawa, September 26, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.
" SIDNEY BREESE,
" T. LYLE DICKEY,
" BENJAMIN R. SHELDON,
" PICKNEY H. WALKER,
" JOHN M. SCOTT,
" ALFRED M. CRAIG,
} Associate Justices.

WHERE a bidder, at a public sale of real estate under a mortgage, transfers his bids to another and directs the deed to be made to such person, if there be no fraud in the transaction, and no loss to the mortgagee thereby, it can not be set up in an action of ejectment against remote purchasers without any notice of the irregularity to defeat their title.

BREESE, J., delivered the opinion of the court:

This was a case of ejectment in the Kendall Circuit Court, brought by Hannah E. Watson, plaintiff, and against John Johnson, defendant. The summons was served August 24, 1869, and there was a trial by the court without a jury, by consent of parties, which resulted in a judgment for the plaintiff, that she was entitled to one-third of the premises described in the declaration as her reasonable dower during her natural life, as widow of Wm. F. Ludgens. A new trial was granted the defendant under the statute, and at the January term, 1871, the cause was again continued by the court, by consent on the general issue, which resulted in a judgment for the plaintiff that she was entitled to one undivided third part of all the land in the declaration mentioned as her reasonable dower, during her natural life, as the widow of Wm. F. Ludgens, "who in his life-time was her husband, and as such seized of said land."

Commissioners were appointed by the court to set-off to the plaintiff her dower, as found by metes and bounds, which was done, and their report made to the court. A motion for a new trial was denied, and judgment rendered for the plaintiff. To reverse this judgment the defendant prosecutes this writ of error, insisting the judgment is against the law and the evidence, and that a new trial should have been awarded.

This action was commenced by the defendant in error, under the authority of section 45, ch. 36, title "Ejectment," R. S. 1845, p. 210, and no point is made on the regularity of the proceedings in the ejectment case. In order to a proper understanding of the case, the prominent facts will be stated.

There is no controversy about the title held by Ludgens in his life-time to the premises in controversy. Holding the title, Ludgens and his wife, the defendant in error here, on August 2, 1859, executed and delivered to one John B. Sherman a mortgage with full covenants on these premises, to secure a note of the same date, which Ludgens had executed to Sherman. The deed provided in case of default in the payment of the money, Sherman or his attorney, after having advertised the sale sixty days in a newspaper published in Oswego, in Kendall County, might sell the premises at public vendue to the highest bidder, for cash, and execute conveyances therefor. This mortgage was duly acknowledged before a notary public of Kendall County, attested by his notarial seal, on the same second day of August, 1859, in which acknowledgment it is certified by the notary that Hannah E., wife of the said Wm. F. Ludgens was examined separate and apart from her husband, and the contents and meaning of the deed fully explained to her, and she acknowledged that she executed the deed voluntarily and freely, and relinquished her dower to the said lands and tenements mentioned, without compulsion of her husband.

Default having been made in the payment of the note, Sherman, on July 3, 1863, executed a power of attorney to one Chambers, authorizing him to sell and convey the premises.

The stipulated notice of the sale was given, and the premises sold at the time and place specified, many persons being present, and the same were stricken off to one Lee, as the highest and best bidder, for the sum of six hundred and twenty dollars. Lee and wife, on July 10, 1863, conveyed the premises to Sherman, and the latter, by quit-claim deed, with a special warranty, conveyed the premises, October 14, 1863, to John Johnson, the plaintiff in error and defendant in the action of ejectment. Johnson, on July 17, 1864, by quit-claim deed, conveyed the north half of the same premises to John Nelson, against whom a similar action was brought and the same recovery had, and who prosecuted his writ of error to this court, and we have considered the cases together.

The point chiefly relied on by defendant in error to sustain this judgment, is the alleged fact that Lee was not the purchaser at this sale, but that one Hartwell was the purchaser, the premises having been stricken off to him.

There is testimony to this fact, but the proof is abundant that the sale was made, in all respects, in pursuance of the terms of the mortgage and Hartwell makes no complaint, and Lee and Chambers have both departed this life, and the real facts of the transaction can not now be fully explained. It is evident, however, from all that appears in the record, that the bid of Hartwell did not exceed the sum of $620, the amount paid by Lee. It is often the case, the bidder, at a public sale like this, transfers his bid to another and directs the deed to be made to such person, and, if there be no fraud in the transaction, and no loss to the mortgagee thereby, there can be no objection. But, if an objection, could it be urged against these defendants, the plaintiffs in error, who are remote purchasers without any notice of any irregularity, and can it be set up, in an action of ejectment, to defeat their title?

This court said, in Cassell v. Ross, 33 Ill. 246, which was a bill in chancery, to set aside a sale made under a trust deed, by the terms of which the sale was to be made for cash, and a credit was given, that a purchaser, on discovering it was a trust fund, was bound to see that at least all of the conditions of the trust deed, up to the execution of the trust deed to himself, were complied with and performed by the trustee; and, when he became a purchaser on time, he became a party to the violation of the condition upon which the sale alone could be made. Being chargeable with notice, he can not evade the effect of the irregularities attending the sale. With a remote purchaser it is believed to be different, but the immediate grantee, under the trustee's sale, must be held to see that all precedent conditions of the sale are complied with by the trustee. p. 259. In Reece v. Allen, 5 Gilm, 236, it was held the grantee of a trustee is not bound to show that the conditions of the trust deed have been complied with by the trustees. The deed conveys the legal title to the estate. And in Hamilton v. Lubuckee, 51 Ill. 415, the same doctrine was received, that a remote purchaser from one purchasing at a sale by a mortgagee, is not chargeable with notice of defects and irregularities attending the sale, but they must be brought home to his knowledge on a proper case made and sustained by proof. There is no evidence tending to show Johnson or Nelson was cognizant of this irregularity, and such irregularity should not avoid the sale—it would be voidable only on a proper case made.

But admitting this sale was made for the benefit of Sherman, the mortgagee, yet it can not be denied his deed by his attorney (Chambers) to Lee, vested the legal title to the estate in Lee. Legal title must prevail in an action of ejectment. If a legal title so acquired is challenged, it can not be investigated in a court of law, but a court of chancery must be invoked. The deed is not void, but voidable only, and a court of chancery may set it aside. Until this is done, it must at law prevail. It was held in Farrar v. Payne, 73 Ill. 82, the fact that a trustee is a purchaser through another at his own sale, will not render the sale void. It is only ground for setting aside the sale in equity, while in the trustee's hands, but not after its transfer to a *bona fide* purchaser without notice of the equity. Plaintiffs in error, on their purchase, went into possession of their respective portions of this tract of land, and made valuable improvements thereon. They were purchasers for a valuable consideration without notice of any irregularities in the sale, and the deeds executed to them conveyed to them the legal title.

If defendant in error has an equity growing out of or inherent in this transaction, a court of equity is open to her in which to establish it. By her deed to Sherman, she voluntarily relinquished her dower in these premises and we do not perceive how in this action, she can assert a right once relinquished. There may be equitabl

grounds on which she may proceed. If there has not been a foreclosure as she claims, she ought not to recover: she redeems her share. The grantees of the purchaser at the mortgage sale are in possession of the premises and no action of ejectment can be maintained against them. Under the rulings of this court, the mortgagee of lands is held in law the owner of the fee, having the *jus in re* as well as *ad rem* and entitled to all the rights and remedies, which the law gives such owner and he may after condition broken maintain ejectment against the mortgagor. Oldham v. Pfleger, 84 Ill. 102.

We are unable to find any ground on which this judgment can be supported, and it must be reversed and a new trial had, and for that purpose the cause is remanded. If the plaintiffs in error have been turned out of possession of their respective portions of this tract of land, as claimed by them, the circuit court will enter such order as may be necessary to restore each of them to the possession of their respective portions.

GUARANTY OF COLLECTION.

BOSMAN v. AKELEY.

Supreme Court of Michigan, October Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }
" T. M. COOLEY, }

THE guarantor of collection of a note can not be sued until legal proceedings diligently pursued have failed to result in collection. That condition precedent is not answered by evidence of the maker's insolvency.

COOLEY, J., delivered the opinion of the court:

This case having been brought to a hearing in the court below, on demurrer to two counts of the declaration, while an issue of fact upon other counts was pending, the court sustained the demurrer, and rendered final judgment on the whole record. This judgment was probably an inadvertence, but we have no alternative but to reverse it with costs, and remand the record for further proceedings.

There still remains on the record the question of law whether the court was right in sustaining the demurrer. The suit was brought on the guaranty by the defendant of the collection of a note made by one Keeler. The form of the guaranty is not given, but the allegation in the declaration is that the defendant, "for a valuable consideration to him in hand paid, by a guaranty in writing indorsed upon said note and signed by said defendant, did guarantee to said plaintiff the collection of said note." It is then averred that at the time the note became due and payable the said Keeler was, and ever since has been, "pecuniarily irresponsible and insolvent," by reason whereof the said note, "at the time when the same became due and payable, was, and ever since has been, and now is uncollectable," and that "the same was duly presented for payment and payment refused." The question presented on demurrer to these allegations is, whether the fact that the maker of the note was pecuniarily irresponsible and insolvent, excuses the neglect to take proceedings at law for collection; or, to state it in other words, whether the terms of the guaranty do not require proceedings at law to enforce the collection of the note as a condition precedent to a resort to the guarantor.

The cases on this subject are greatly at variance. In McDoal v. Yeomans, 8 Watts, 361, it was held that on a guaranty that a note is "collectable," it is not necessary for the guarantee to attempt collection by legal proceedings if the maker is insolvent. See, also, McClurg v. Fryer, 15 Penn. St. 293. This has always been the doctrine of the courts in Massachusetts. Sanford v. Allen, 1 Cush. 473, explaining Marsh v. Day, 18 Pick. 321. See Miles v. Linnell, 97 Mass. 298. And as to Maine, see Culligan v. Boardman, 29 Me. 79. In Wheeler v. Lewis, 11 Vt. 265, it is said that where a note is warranted "good and collectable," the holder is bound to resort to legal measures within a reasonable time, and to pursue them with common diligence, or show what is equivalent, the absolute insolvency of the maker of the note. To the same effect are Bull v. Bliss, 30 Vt. 127; Dana v. Conant, 30 Vt. 246. And see Thompson v. Armstrong, 1 Ill. 23; Stern v. Rockefaller, 29 Ohio N. S. 625. Cases in Connecticut, sometimes cited as supporting these, have no bearing, as they rest on peculiarities in the local law of indorsement. Perkins v. Catlin, 11 Conn. 213; Ranson v. Sherwood, 26 Conn. 437.

The New York cases, on the other hand, have always held that in fixing liability on such a guaranty, the only evidence that the note is uncollectable is the failure of legal proceedings, diligently pursued, to result in collection. Moably v. Riggs, 19 Johns. 69; Thomas v. Woods, 4 Cow. 173; Taylor v. Bullen, 6 Cow. 624; Morris v. Woodworth, 11 Wend. 100; White v. Case, 13 Wend. 543; Curtis v. Smallman, 14 Wend. 231; Loveland v. Shepard, 2 Hill, 139; Craig v. Parkis, 40 N. Y. 181. In Wisconsin the rule is the same. Day v. Elmore, 4 Wis. 190; Borden v. Gilbert, 13 Wis. 670; Dyer v. Gibson, 13 Wis. 557; French v. Marsh, 29 Wis. 649. The like rule seems to be recognized in Kentucky. Ely v. Bibb, 4 J. J. Marsh, 71. And in Texas, Shepard v. Shears, 35 Texas, 763. See, also, Peck v. Frink, 10 Iowa, 193.

The point has never been directly passed upon in this court; but in Dwight v. Williams, 4 McLean, 581, the Circuit Court of the United States for this circuit approved and applied the New York rule. We believe that rule to be reasonable, and to accord with the general understanding of parties when such guaranties are given. The undertaking that a note is collectable means that if proceedings for collection are diligently prosecuted at law, they shall result in collection. It does not mean that the maker of the note is responsible, but that the debt shall be collected if the proper steps are promptly taken for the purpose. It may be that an

officer would find attachable property where the witnesses know of none; it may be that, with the large exemptions allowed by law, the debtor would choose to make payment, rather than have the judgment stand against him, even when payment could not be enforced.

It follows that the circuit judge did not err in sustaining the demurrer.

DAMAGES — REMOTENESS — BREACH OF CONTRACT BY CARRIER FOR CARRIAGE OF HORSES.

WALLER v. MIDLAND GREAT WESTERN R. CO.

Irish High Court of Justice, Queen's Bench Division, November, 1878.

THE plaintiff, purposing to sell certain horses by auction at Dublin, on the 26th of April, agreed with the defendant, a railway company, that the horses should be carried by rail to Dublin on the 24th of April, as the horses should be on view the day before the auction. The defendants failed to provide the necessary means of carriage for the horses on the 24th, whereupon the plaintiff took them by road to Dublin, having no other alternative if he wished to sell them at the auction contemplated. In consequence of the journey some of the horses were deteriorated in appearance, one of them was lamed, and those which were sold fetched less prices than would otherwise have been realized; but for some time previous the horses had been fed on soft food, and had they been in hard hunting condition they would not have been the worse of the journey. *Held*, that the injury to the horses was attributable to the default of the defendants, and not to the condition in which the horses were; and that damages awarded in consequence of the deterioration in the selling value of the horses were not too remote.

This action was brought to recover damages for breach of contract by the defendants, who had agreed to carry 27 horses by rail from Athboy to Dublin, on April 24, 1878, but only so carried 12 of said horses; the plaintiff averring that he had intended that the horses should be carried in order to be sold by auction on April 27th, but that, by reason of the breach, he was obliged to send 15 by road, and thereby incurred great expense, and thereby also the horses were deteriorated in value and some of them rendered valueless.

Judgment went by default, and an inquiry to assess the damages was had before the Master and a jury.

It appeared from the evidence of the plaintiff that at the close of the hunting season he had 27 horses advertised for sale by auction, on April 26, 1878, at Sewell's horse repository. On April 22nd the plaintiff saw the defendants' station master at Navan, and told him that he required nine horse boxes to convey his horses to Dublin on the 24th, as he wanted them on the 27th at Sewell's. The station master said he would telegraph to Dublin and would have the boxes. The plaintiff subsequently received the following:—"Mem. Manager to carry horses for £10, at his own risk." The plaintiff replied assenting, and inquiring if the boxes would be ready at Athboy; to which he received an answer that the station master would have the boxes, and that he (plaintiff) could send the horses by the 3.25 p. m. train on the following day (April 24th), and enclosing the conditions for signature. The plaintiff's steward deposed that he arrived with the horses at Athboy station at 2.30 p.m. on the 24th, but that there were only boxes to carry 12. He inquired from the station master why the boxes were not there, and whether there was any chance to get on in time for Dublin next morning, so as to have the horses on view at Sewell's. The station master could give no decided answer, but telegraphed to Dublin. No answer having been received, no further boxes having arrived, and the station master being unable to undertake to have such early on the next morning, the plaintiff's groom started for Dublin by road with 15 horses, the other 12 being sent on by rail. The distance ridden to Dublin was 24 miles, and it was proved that several of the horses were deteriorated in appearance in consequence of the journey, and one of them was lamed; and that some of them were sold, but at prices less than they would have fetched but for their deteriorated appearance. It further appeared that the horses had recently been fed on soft food, and one of the plaintiff's witnesses stated that had the horses been in hard hunting condition they would not have been the worse of the journey.

The jury having found a verdict for £200 damages in respect of the laming and injury to the horses:—

The Macdermot, Q.C. (*C. F. Ferguson* with him), on behalf of the defendants, moved that the verdict be set aside, and that judgment be entered for the plaintiff for nominal damages instead, on the ground that the damages in respect of which the verdict was had for £200 were too remote, and, if incurred, were attributable to the acts of the plaintiff and his servants.

Heron, Q.C. (*J. N. Gerrard* with him), *contra*.

The following cases were cited:—Hobbs and Wife v. L. & S. W. Ry. Co., L. R. 10 Q. B. 111; Collier and Wife v. D. W. & W. Ry. Co., 8 Ir. L. T. Rep. 24; Hadley v. Baxendale, 9 Ex. 341, 351; Elbinger Actien-Gesellschaft v. Armstrong, L. R. 9 Q. B. 473; Horne v. Mid. Ry. Co., L. R. 7 C. P. 583, 591, 8 ib. 136; Cory v. Thames Iron-works Co., L. R. 3. Q. B. 181; Simpson v. L. & N. W. Ry. Co., 1 Q. B. Div. 274; Le Blanch v. L. & N.W. Ry. Co., 1 C. P. Div. 286; Fletcher v. Tayleur, 17 C. B. 21; Mayne on Damages, 3rd Ed., 18, 39, *et seq.*

MAY, C. J.—The facts of this case are few and were not substantially matter of dispute between the parties. It appears that the plaintiff, who resides in the county of Meath, after the termination of the hunting season had a large number of hunters (27), which he was anxious to send up to Dublin to be sold by auction at a large sale of similar animals to be held at Sewell's, a well known auction mart, on Friday, 26th April. Some communications took place between the plaintiff and the agent of a railway company, which eventuated in an agreement by which the company agreed to

carry these 27 horses at the reduced rate of £10; it was settled that the horses should go on the afternoon of Wednesday, the 24th. The agents of the railway company were aware that the horses were intended for the auction, and it appeared that though the auction was to take place on Friday, yet the horses should be in the stable on Sewell's premises on Thursday, in order that they might be seen and examined by intending purchasers before the auction. The horses were brought to the station at Athboy by the plaintiff's servants on Wednesday about 2:30 P. M., 3:30 being the hour at which the train was to start. But it then appeared that the defendants' agents could not supply horse-boxes for more than 12 horses, nor could they undertake to furnish boxes for the other horses early on the next morning. The servants of the plaintiff under these circumstances took the 15 horses by road to Dublin, and the distance being about twenty-four miles, they did not arrive at Sewell's establishment until 10 o'clock P. M., on that day. The plaintiff gave evidence that several of the horses were deteriorated in appearance by the journey, and one of them was lame in consequence; that some of them were sold, but at a price less than they would have fetched had they presented the appearance which they would have borne but for the journey. It appeared that the plaintiff had no alternative but to send his horses by road to Dublin, if he wished to attain his object of selling them at this auction. The plaintiff sued the defendants for their breach of contract; the defendants let judgment go by default, and on an inquiry before the master to assess damages, the jury found a verdict for £200 damages. The defendants moved to reduce the damages to a nominal amount. It appeared in evidence that these horses—the hunting season having terminated about three weeks before the Wednesday in question—had been fed on soft food; and one of the plaintiff's witnesses had stated that had they been in hard hunting condition they would not have been the worse of the journey.

It was contended that the injury to the horses must be regarded as attributable to the soft condition in which they were in, not to any default of the defendants. But I do not think this argument a sound one, as the horses were not in a condition rendering them susceptible to injury in an extraordinary degree—it was rather that they were no longer in an exceptional state of condition, which perhaps had it continued would have enabled them to bear the journey with impunity. But, the defendants' counsel also contended that damages awarded in consequence of the deterioration in selling value of the horses were too remote, and could not be taken into consideration by the jury. Several cases were cited by counsel on both sides, as might have been expected from the nature of the question, which is one that has been very frequently the subject of discussion. The rule of law applicable to the case, it seems admitted, was laid down with substantial correctness in the often-cited case of Hadley v. Baxendale, in the following terms: "When two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally—*i.e.*, according to the usual course of things, from such breach of contract itself, or, such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." I think the damages in this case fall within both branches of the above definition. The horses were injured and deteriorated in value by the fatigue, which naturally and necessarily resulted from the journey which the defendants' default rendered necessary. This fatigue and consequent injury was the direct and immediate consequence of the defendants' breach of contract—not the effect of any accident, or collateral event over which the defendants had no control. So, also, I think the injury to the horses must be considered to have been within the contemplation of the parties, it being known to both that the horses were intended for sale on Friday, and for inspection on Thursday; and that it was certainly probable that horses starting at 4 in the afternoon to travel 24 miles in the same evening, would arrive late at night, somewhat worn and exhausted, and would not present the best appearance on the following day, The case of Hobbs v. London and Southwestern Railway Company, L. R. 10 Q. B. 111, cited by the defendants, resembled the case most closely. There the defendants, the railway company, conveyed the plaintiff and his wife and children, not to Hampton, according to their contract, but to Exeter, where they arrived at 12 o'clock at night. The plaintiff could not obtain any conveyance and was obliged with his family to walk from Exeter to Hampton—the night was wet, and the party did not arrive at home till 3 A. M. of the next morning. The plaintiff was held entitled to recover £8 as compensation for personal inconvenience, but not to a sum of £20 allowed by the jury on account of expenses of medical attendance on his wife, who caught a severe cold on the occasion. This latter damage was considered too remote, the wetness of the night and the consequent illness occasioned to the lady being considered as contingencies, but which could not have been foreseen, and did not follow naturally and immediately from the breach of contract. The deterioration of the horses in the present case, directly caused by the fatigue of the journey, seems to me to resemble the inconvenience which was allowed for in the case referred to, rather than the expenses occasioned by the illness. I do not think it necessary to examine in detail the other cases cited on both sides; it is admitted that the rules on the subject are vague and indeterminate, and each case must depend on its own circumstances. In the case now before the court I think the damages allowed for by the jury were connected with sufficient closeness and proximity with the breach of contract of the defendants, and the plaintiff is entitled to retain his verdict.

O'BRIEN, and FITZGERALD, JJ., concurred.

CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—NOTES ISSUED DURING REBELLION.

KEITH v. CLARK.

Supreme Court of the United States, October Term, 1878.

1. WHERE A CASE HAS BEEN DECIDED in an inferior court of a State on a single point which would give this court jurisdiction, it will not be presumed here that the Supreme Court of the State decided it on some other ground not found in the record or suggested in that court.

2. THE STATE OF TENNESSEE having organized in 1838 the Bank of Tennessee, agreed by a clause in the charter to receive all its issues of circulating notes in payment of taxes, but by a constitutional amendment of 1865, it declared the issues of the bank during the insurrectionary period void, and forbid their receipt for taxes: *Held*, that this was forbidden by the constitutional provision against impairing the obligation of contracts.

3. THERE IS NO EVIDENCE IN THIS RECORD that the notes offered in payment of taxes by plaintiff were issued in aid of the rebellion, or on any consideration forbidden by the Constitution or laws of the United States, and no such presumption arises from anything of which this court can take judicial notice.

4. THE POLITICAL SOCIETY which in 1796 was organized and admitted as a State into the Union, by the name of Tennessee, has remained the same body-politic to this time. Its attempt to separate itself from that Union did not destroy its identity as a State nor free it from the binding force of the Federal Constitution.

5. BEING THE SAME POLITICAL ORGANIZATION during the rebellion and since, that it was before, an organization essential to the existence of society, all its acts, legislative and otherwise, during the period of the rebellion, are valid and obligatory on the State now, except where they are done in aid of that rebellion or in conflict with the Constitution and laws of the United States, or were intended to impeach its authority.

6. IF THE NOTES which were the foundation of this suit were issued on a consideration which would make them void for any of the reasons mentioned, it is for the party asserting their invalidity to set up and prove the facts on which such a plea is founded.

In error to the Supreme Court of Tennessee.

Mr. Justice MILLER delivered the opinion of the court;

The plaintiff in error, who was plaintiff below, sued the defendant for the sum of $40, which he had paid in lawful money under protest for taxes due the State of Tennessee after he had tendered to defendant that sum in the circulating notes of the Bank of Tennessee, which defendant refused to receive.

The suit was commenced before a justice of the peace, taken by appeal to the Common-Law Chancery Court of Madison County, and from there to the Supreme Court of Tennessee, and by writ of error from this court it is now before us for review.

In all the trials in the state courts, judgment was rendered against plaintiff. The jurisdiction of this court is denied again, though it has been affirmed in the analogous cases of Woodruff v. Trapnall, 10 How. 208, and Furman v. Nicholls, 8 Wall. 44. As the same facts are involved in the question of jurisdiction and the issue on the merits it may be as well to state them. They appear in a bill of exceptions taken at the trial on the first appeal, which was a trial *de novo* before a jury. The defendant was a collector of taxes, to whom plaintiff had tendered $40 of the bills of the Bank of Tennessee, which with other lawful money tendered at the same time was the amount due. The offer of plaintiff was founded on the 12th section of the charter of the bank enacted in 1838 by the legislature of the State, which reads thus: "Be it enacted that the bills or notes of the said corporation originally made payable or which shall have become payable on demand in gold or silver coin, shall be receivable at the treasury of this State and by all tax-collectors and other public officers in all payments for taxes or other moneys due to the State." It was proved that the bills were issued subsequent to May 6, 1861, and were known as the "Torbet or new issue," and were worth in the brokers' market about twenty-five cents on the dollar. The court charged the jury that if the notes tendered were issued subsequent to May 6, 1861, and during the existence of the state government established at that date in hostility to the government of the United States, then defendant was not legally bound to receive them in payment of plaintiff's taxes. And the reason given for this was that while the Constitution of the United States protected the contract of the section of the charter we have cited from repudiation by state legislation as to notes issued prior to the act of secession of May 6, 1861, it conferred no such protection as to notes issued while the State was an insurrectionary government, and that consequently the provisions of section 6 of the schedule to the constitutional amendment of 1865, which declared that all the notes of the bank issued after the date above mentioned were null and void, and forbade any legislature to pass laws for their redemption, was a valid exercise of state authority. On this instruction the jury found a verdict for the defendant. In the Supreme Court the judgment rendered on this verdict was affirmed without any opinion or other evidence of the grounds on which it was so affirmed.

There can be no question that the charge of the trial judge to the jury decided against the plaintiff in error a question which gives this court jurisdiction, and this is admitted by counsel, who ask us to dismiss the writ of error.

The ground assumed in support of the motion is that we ought to presume that the Supreme Court did not decide the question which the court below did, but affirmed the judgment on the ground that, by the laws of Tennessee, no suit could be brought against the State or against the collector of taxes, and that the justice of the peace who first tried the case, and the court to which the appeal was taken, had no jurisdiction. It would follow, say counsel,

that as this was a question of state law it could not be reviewed in this court.

The answers to this are several and very obvious.

1. Where an appellate court decides a case on the ground that the inferior court had no jurisdiction, it in some mode indicates that it was not a decision on the merits, to prevent the judgment being used as a bar in some court which might have jurisdiction. Barney v. Baltimore, 6 Wall. 277; House v. Mullen, 22 Wall. 42; Kendig v. Dean, at this term. 2. In Tennessee v. Sneed, 96 U. S. 69, 6 Cent. L. J. 144 this court decided that the courts of Tennessee did have the jurisdiction which this suggestion denies them, and we will not presume, without very strong reason for it, that the Supreme Court of Tennessee disagreed with this court on that point. 3. There is not the slightest evidence in the record, nor any reason to be drawn from it, to believe that the court decided any such question. It nowhere appears that it was raised. Nothing like it is found in the bill of exceptions. There is no plea to the jurisdiction or motion to dismiss for want of it. And we are bound by any fair rule of sound construction to hold that the Supreme Court, in affirming the judgment of the court below, did it on the only ground on which that court acted, or which was raised by the record. That question was whether the 12th section of the charter of the bank constituted a contract which brought the issues of the bank after the 6th May, 1861, within the protective clause of the Constitution of the United States against impairing the obligation of contracts by state laws. Of that question this court has jurisdiction, and we proceed to its consideration.

In the case of Furman v. Nichols, the 12th section of the charter of the bank, the same now under consideration, was held to constitute a contract between every holder of the circulating notes of the bank and the State of Tennessee, that the State would receive the notes in payment of taxes at their par value. And it was held that the same provision of the state Constitution of 1865, which is relied on here, was void as impairing the obligation of that contract. The case of Wodruff v. Trapnall, 10 How. 208, was referred to as being perfect in its analogy, both in the character of the bank and its relation to the State, and the contract to receive its notes in payment of taxes. In the case in 8th Wallace, however (which is the identical case before us, except that in the former case the notes were issued prior to May 6, 1861), the court out of abundant caution said, that it did not consider or decide anything as to the effect of the civil war on that contract, or to notes issued subsequent to that date. We are invited now to examine that point and to hold that as to all such notes the 12th section creates no valid contract.

In entering upon this inquiry we start with the proposition that unless there is something in the relation of the State of Tennessee and the bank, after the date mentioned, to the government of the United States, or something in the circumstances under which the notes now sued on were issued, that will repel the presumption of a contract under the 12th section, or will take the contract out of the operation of the protecting clause of the federal Constitution; this court has established already that there was a valid contract to receive them for taxes, and that the law which forbade this to be done is unconstitutional and void.

Those who assert the exception of these notes from the general proposition are not very well agreed as to the reasons on which it shall rest, and we must confess that as they are presented to us they are somewhat vague and shadowy. They may all, however, as far as we understand them, be classed under three principal heads.

1. The first is to us an entirely new proposition, urged with much earnestness by the counsel who argued the case orally for the defendant.

It is in substance that what was called the State of Tennessee prior to the 6th May, 1861, became, by the ordinance of secession passed on that day, subdivided into two distinct political entities, each of which was a State of Tennessee. One of them was loyal to the federal government, the other was engaged in rebellion against it. One State was composed of the minority who did not favor secession, the other of the majority who did. That these two States of Tennessee engaged in a public war against each other, to which all the legal relations, rights, and obligations of a public war attached. That the government of the United States was the ally of the State of Tennessee and the Confederated rebel States were the allies of the disloyal State of Tennessee. That the loyal State of Tennessee, with the aid of her ally, conquered and subjugated the disloyal State of Tennessee, and by right of conquest imposed upon the latter such measure of punishment and such system of laws as it chose, and that by the law of conquest it had the right to do this. That one of the laws so imposed by the conquering State of Tennessee on the conquered State of Tennessee, was this one declaring that the issues of the bank during the temporary control of affairs by the rebellious State was to be held void; and that as conqueror and by right of conquest, the loyal State had power to enact this as a valid law.

It is a sufficient answer to this fanciful theory that the division of the State into two States never had any actual existence That, as we shall show hereafter, there has never been but one political society in existence as an organized State of Tennessee from the day of its admission to the Union in 1796 to the present time. That it is a mere chimera to assert that one State of Tennessee conquered by force of arms another Tennessee and imposed laws upon it. And finally, that the logical legerdemain by which the State goes into rebellion and makes while thus situated contracts for the support of the government in its ordinary and usual functions, which are necessary to the existence of social life, and then by reason of being conquered repudiates these contracts, is as hard to understand as similar physical performances on the stage.

2. The second proposition is a modification of this, and deserves more serious attention. It is, as we understand it, that each of the eleven States who passed ordinances of secession and joined the

so-called Confederate States, so far succeeded in their attempt to separate themselves from the Federal government that during the period in which the rebellion maintained its organization, those States were in fact no longer a part of the Union, or if so, the individual States by reason of their rebellious attitude were mere usurping powers, all of whose acts of legislation or administration are void, except as they are ratified by positive laws enacted since the restoration or are recognized as valid on the principles of comity or sufferance.

We cannot agree to this doctrine. It is opposed by the inherent powers which attach to every organized political society possessed of the right of self-government. It is opposed to the recognized principles of public international law, and it is opposed to the well-considered decisions of this court.

"Nations or States," says Vattel, "are bodies politic, societies of men united together for the promotion of their mutual safety and advantage by the joint efforts of their combined strength. Such a society has her affairs and her interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself, and is susceptible of *obligations* and *rights*."—Law of Nations, § 1. Cicero and subsequent public jurists define a State to be a body political or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.—Wheaton's International Law, § 17. Such a body or society when once organized as a State by an established government, must remain so until it is destroyed. This may be done by disintegration of its parts, by its absorption into and identification with some other State or nation or by the absolute and total dissolution of the ties which bind the society together. We know of no other way in which it can cease to be a State. No change of its internal polity, no modification of its organization or system of government nor any change in its external relations short of entire absorption in another State can deprive it of existence or destroy its identity.—See Wheaton's International Law, § 22.

Let us illustrate this by two remarkable periods in the history of England and France. After the revolution in England which dethroned and decapitated Charles the I., which installed Cromwell as supreme, whom his successors called a usurper; after the name of the government was changed from the Kingdom of England to the Commonwealth of England, and when, after all this, the son of the beheaded monarch came to his own, treaties made in the interregnum were held valid, the judgments of the courts were respected, and the obligations assumed by the government were never disputed. So of France. Her bloody revolution, which came near dissolving the bonds of society itself, her revolutionary directory, her consul, her Emperor, Napoleon, and all their official acts have been recognized by the nation, by the other nations of Europe, and by the legitimate monarchy when restored, as the acts of France, and binding on her people.

The political society, which in 1796 became a State of the Union by the name of the State of Tennessee, is the same which is now represented as one of those States in the Congress of the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has from that time always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption and in regular order. It has changed, modified, and reconstructed its organic law, or state Constitution, more than once. It has done this before the rebellion, during the rebellion, and since the rebellion. And it was always done by the collective authority and in the name of the same body of people constituting the political society known as the State of Tennessee. This political body has not only been all this time a State, and the same State, but it has always been one of the United States—a State of the Union. Under the Constitution of the United States, by virtue of which Tennessee was born into the family of States, she had no lawful power to depart from that Union. The effort which she made to do so, if it had been successful, would have been so in spite of the Constitution, by reason of that force which in many other instances establishes for itself a status, which must be recognized as a fact, without reference to any question of right, and which in this case would have been, to the extent of its success, a destruction of the Constitution. Failing to do this the State remained a State of the Union. She never escaped the obligations of that Constitution, though for awhile she may have evaded their enforcement.

In the case of Texas v. White, 7 Wall. 700, the first and important question was whether Texas was then one of the United States, and as such, capable of sustaining an original suit in this court by reason of her being such State. And this was at a time when Congress had not permitted her, after the rebellion, to have representatives in either house of that body. Chief Justice Chase in delivering the judgment of the court on this question says, "The ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the legislation to give effect to that ordinance, were absolutely null. They were utterly without operation in law. The obligation of the State, as a member of the Union, and of every citizen of the State, as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise the State must have been foreign and her citizens foreigners. The war must have ceased to be a war for the suppression of the rebellion, and must have become a war of conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred." In the case of White v. Hart, 13 Wall. 651, Mr. Justice Swayne, after a full consideration of the subject, states the

result in this forcible language: "At no time were the rebellious States out of the pale of the Union. Their constitutional duties and obligations were unaffected, and remained the same." And he shows by reference to the formula used in the several reconstruction acts, as compared with those for the original admission of new States into the Union, that in regard to the States in rebellion there was a simple recognition of their restored right to representation in Congress, and no re-admission into the Union. These cases, and especially that of Texas v. White, have been repeatedly cited in this court with approval, and the doctrine they assert must be considered as established in this forum at least.

It would seem to follow that if the State of Tennessee has through all these transactions been the same State, and has also been a State of the Union, and subject to the obligations of the Constitution of the Union, the contract which she made in 1838 to take for her taxes all the issues of the bank of her own creation, and of which she was sole stockholder and owner, was a contract which bound her during the rebellion,and which the Constitution protected then and now,as well as before. Mr. Wheaton says, "As to public debts—whether due to or from the State—a mere change in the form of the government,or in the person of the ruler, does not affect their obligation. The essential power of the State, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution. The new government succeeeds to the fiscal rights and is bound to fulfill the fiscal obligations of the former government." International Law, sec. 30. And the citations which he gives from Grotius and Puffendorf sustain him fully.

We are gratified to know that the Supreme Court of the State of Tennessee has twice affirmed the principles just laid down in reference to the class of bank-notes now in question. In a suit brought by the State of Tennessee against this very Bank of Tennessee, to wind up its affairs and distribute its assets, that court in April, 1875, decreed, among other things, "that the acts by which it was attempted to declare the State independent, and to dissolve her connection with the Union, had no effect in changing the character of the bank, but that it had the same powers, after as before these acts, to carry on a legitimate business and that the receiving of deposits was part of such legitimate business." "That the notes of the bank issued since May 6, 1861, held by Atchison and Duncan, and set out in their answer, are legal and subsisting debts of the bank, entitled to payment at their face value, and to the same priority of payment out of the assets of the bank as the notes issued beforeMay 3,1861."

At a further hearing of the same case in January, 1877, that court reaffirmed the same doctrine, and also held that the notes were not subject to the statute of limitation, and were not bound by it.—State of Tennessee v. Bank of Tenn., not reported. This decision was in direct conflict with schedule 6 of the constitutional amendment of 1865, which declared all issues of the bank after May 6, 1861, void, and it necessarily held that the schedule was itself void as a violation of the Federal Constitution.

3. The third proposition on which the judgment of the courts of Tennessee is supported, is that the notes on which the action is brought were issued in aid of the rebellion, to support the insurrection against the lawful authority of the United States, and are, therefore, void for all purposes.

The principle stated in this proposition, if the facts of the case come within it, is one which has repeatedly been discussed by this court. The decisions establish the doctrine that no promise or contract, the consideration of which was something done or to be done by the promisee, the purpose of which was to aid the war of the rebellion or give aid and comfort to the enemies of the United States in the prosecution of that war, is a void promise or contract, by reason of the turpitude of its consideration.

In the case to which we have already referred, of Texas v. White , 7 Wall. 700, the suit was for the recovery of certain bonds of the United States which previous to the war had been issued and delivered to the State of Texas. During the rebellion the legislature of that State had placed these bonds in the hands of a military commission, and they were delivered by that committee to White and Childs to pay for supplies to aid the military operations against the government. This court held that while the State was still a State of the Union, and her acts of ordinary legislation were valid, it was otherwise in regard to this transaction. As this is the earliest assertion of the doctrine in this court, and this branch of the opinion received the assent of all the members of the court but one, and has been repeatedly cited since with approval, we reproduce a single sentence from it: "It may be said," say the court, "perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such, for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, personal or real, and providing remedies for injuries to the person and estate, and other similar acts which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual though unlawful government; and that acts in furtherance or support of rebellion against the United States or intended to defeat the just rights of citizens, and other acts of like nature, must in general be regarded as invalid." 8 Wall. 733.

In Doane v. Hanouer it was held that due-bills given in purchase of supplies, by a purchasing agent of the Confederate States, were void though in the hands of a third party; and in support of the judgment Mr. Justice Bradley said, "We have already decided, in the case of Texas v. White, that a contract made in aid of the late rebellion,

or in furtherance or support thereof, is void. The same doctrine is laid down in most of the circuits, and in many of the state courts, and must be regarded as the settled law of the land." 12 Wall. 345,

The latest expression of the court on the subject was by Mr. Justice Field, without dissent, at the last term, in the case of Williams v. Bruffy, in which the whole doctrine is thus tersely stated: "While thus holding that there was no validity in any legislation of the Confederate States which this court can recognize, it is proper to observe that the legislation of the States stands on very different grounds. The same general form of government, the same general laws for the administration of justice and the protection of private rights, which had existed in the State prior to the rebellion, remained during its continuance and afterwards. As far as the acts of the States did not impair, or tend to impair the supremacy of the national authority, or the just rights of the citizens under the Constitution, they are in general to be treated as valid and binding." 96 U. S. 192; see Horn v. Lockhart, 17 Wall. 570; Sprott v. United States, 20 Wall. 459.

There is, however, in the case before us nothing to warrant the conclusion that these notes were issued for the purpose of aiding the rebellion, or in violation of the laws or the Constitution of the United States. There is no plea of that kind in the record. No such question was submitted to the jury which tried the case. The sole matter stated in defence, either by the facts found in the bill of exceptions, or in the decree of the court, is that the bills were issued after May 6, 1861, while the State was in insurrection, and, therefore, come within the amended Constitution of 1865, declaring them void. The provision of the state Constitution does not go upon the ground that the state bonds and bank-notes, which it declared to be invalid, were issued *in aid of the rebellion*, but that they were issued by a *usurping government*, a reason which we have already demonstrated to be unsound. Not only is there nothing in the Constitution or laws of Tennessee to prove that these notes were issued in support of the rebellion, but there is nothing known to us in public history which leads to this conclusion. The opinion of the Supreme Court, which we have already cited, states that the bank was engaged in a legitimate business at this time, receiving deposits, and otherwise performing the functions of a bank; and though, as is abundantly evident, willing enough to repudiate these notes as receivable for taxes, that court held them to be valid issues of the bank, in the teeth of the ordinance declaring them void.

It is said, however, that considering the revolutionary character of the state government at that time, we must presume that these notes were issued to support the rebellion.

But while we have the Supreme Court of Tennessee holding that the bank during this time was engaged in a legitimate banking business, we have no evidence whatever that these notes were issued under any new law of the rebel state government, or by any interference of its officers, or that they were in any manner used to support the state government. If this were so it would still remain that the state government was necessary to the good order of society, and that in its proper functions it was right that it should be supported.

We cannot infer, then, that these notes were issued in violation of any federal authority.

On the other hand, if the fact be so, nothing can be easier than to plead it and prove it. Whenever such a plea is presented we can, if it comes to us, pass intelligently on its validity. If issue is taken the facts can be embodied in a bill of exceptions or some other form, and we can say whether those facts render the contract void. To undertake to assume the facts which are necessary to their invalidity on this record is to give to conjecture the place of proof and to rest a judgment of the utmost importance on the existence of facts not found in the record nor proved by any evidence of which this court can take judicial notice. We shall, when the matter is presented properly to us, be free to determine, on all the considerations applicable to the case, whether the notes that may be then in controversy are protected by the provision of the Constitution or not. And that is the only question of which, in a case like the present, we would have jurisdiction.

The judgment of the Supreme Court of Tennessee is, therefore, reversed, and the case remanded to that court for further proceedings in accordance with this opinion.

Mr. Chief Justice WAITE, Mr. Justice BRADLEY, and Mr. Justice HARLAN, dissenting.

MR. JUSTICE MILLER ON THE REMOVAL OF JUDGES AND THE JURY SYSTEM.

THE REMOVAL OF JUDGES.

On the other hand it must be confessed that the means provided by the system of organic law in America for removing a judge, who for any reason is found to be unfit for his office, is very unsatisfactory. With the exception of a few states which have retained the old fashioned mode of removing an officer by an address to the governor of two-thirds of each house of the legislature, impeachment is the only remedy. The Constitution of the United States, which in this respect is the model on which those of the States are formed declares that the president, vice-president, and all civil officers shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes or misdemeanors; that the trial shall be by the senate on articles preferred by the house of representatives, and that no person shall be convicted without the concurrence of two-thirds of the members present.

What the "high crimes and misdemeanors" are for which the remedy may be invoked, remains unsettled to this day. It was the most important question in the most important state trial ever held in this country, namely, the impeachment of President Johnson, and was left there as undecided as ever. There were those who believed that some specific penal offense defined by statute, must be proved, or there could be no conviction; and on this ground several of the senators, who voted for acquittal, rested their judgment; while

many of those who voted for conviction, constituting, perhaps, a majority of the senate, were of the opinion that there might be such dangerous exercise of unauthorized power, such total refusal to perform, and such moral delinquency in regard to the duties and requirements of the place as would amount to a high misdemeanor in the sense of the Constitution. Whichever view of that point may be right, it is very certain that after the experience of nearly a century, the remedy by impeachment in the case of the judges, perhaps in all cases, must be pronounced utterly inadequate. Besides the main difficulty of deciding in each case whether the charge if proved, is an impeachable offense, there is almost equal difficulty in obtaining a two-thirds vote in a body political rather than judicial in its character, liable to changes in its constituency during the usual delay of such a trial, and open from its very nature to appeals to party prejudice, to compassion and to personal friendship.

It is not easy, however, to suggest a better remedy. The tribunal would be rendered more efficient and more safe by a specific definition of the causes of removal. There are many matters which ought to be causes for removal that are neither treason, bribery, nor high crimes and misdemeanors. Physical infirmities for which a man is not to blame, but which may wholly unfit him for judicial duty, are of this class. Deafness, loss of sight, the decay of the faculties by reason of age, insanity, prostration by disease from which there is no hope of recovery—these should all be reasons for removal, rather than that the administration of justice should be obstructed or indefinitely suspended.

So, also, there are offenses against the law, or conduct which might be made so, that peculiarly unfit a man for the office of judge. A vile and overbearing temper becomes sometimes in one long accustomed to the exercise of power, unendurable to those who are subjected to its humors. But I think the experience of observers will bear me out in saying that habitual intoxication is of all this class of disqualifications the most frequent.

Two things may be suggested as worthy of consideration in any effort to amend Constitutions on this subject, namely: that the causes for which a judge may be removed from office shall be described with the same precision as that which is used in defining indictable offenses. Second, that whatever may be the nature of the court before which he is tried, the facts of his guilt of the impeachable offense, or disqualification charged, should be found by a jury or some similar tribunal. It is however to be remembered that a jud ge should, in the exercise of his functions, be trammeled as little as possible by fear of consequences to himself, and in view of the resentments of disappointed suitors the providing for the removal should not be made too easy.

THE JURY SYSTEM.

As occupying an important place in the machinery of the courts, the jury is next entitled to our consideration. No institution which we have inherited from our ancestors has been as little disturbed by legislative action as trial by jury; and none seems so firmly fixed in the affections of the people with all its accessories. It is the theme of the popular orator when all else fails, and a comparison of our happy condition with that of the benighted nations of Europe would fail to satisfy the public taste, if it did not dwell with emphasis on our ancient system of trial by jury, as the palladium of our liberties. Still there are indications of dissatisfaction. Illinois, by her most recent Constitution, permits the legislature to abolish grand juries. Colorado does the same. Nevada allows three-fourths of the jury to render a verdict. Perhaps this ast is a valuable innovation. It requires all the veneration which age inspires for this mode of dispensing justice, and all that eminent men have said of its value in practice, to prevent our natural reason from revolting against the system, and especially some of its incidents. If a cultivated oriental were told for the first time that a nation, which claims to be in advance of all others in its love of justice and its methods of enforcing it, required, as one of its fundamental principles of jurisprudence, that every controversy between individuals, and every charge of crime against an offender, should be submitted to twelve men without learning in the law, often without any other learning, and that neither party to the contest could prevail until all the twelve men were of one opinion in his favor, he would certainly be amazed at the proposition. Nor have the European nations differed much with nim in their estimate of trial by jury. It has been well understood, and received the careful consideration of continental jurists for a great many years, without being adopted by any of them, in the form that we have it from England. Many attempts have been made to introduce it, in some modified shape, but I think it safe to say that it has not in its essential Anglo-Saxon feature met the approval of any people except those of that race. In the days when kings exercised arbitrary power, the jury was among the sturdy, liberty-loving Englishmen a valuable barrier against oppression by the crown. But in this country, where the people are sovereign, the jury is but too often the mere reflection of popular impulse, and the safety of an innocent man is more frequently found to depend on the firmness of the judge than the impartiality of the jury. Still it is probably wise that no man shall be convicted of an infamous crime until twelve fair-minded men are convinced of his guilt. I am also forced to admit, however, that even in civil cases my experience as a judge has been much more favorable to jury trials than it was as a practitioner. And I am bound to say that an intelligent and unprejudiced jury, when such can be obtained, who are instructed in the law with such clearness, precision and brevity as will present their duty in bold relief, are rarely mistaken in regard to facts which they are called upon to find.

Since public opinion is not ripe for a candid consideration of the abolition of the jury system in civil cases, it is the part of wisdom in the legislator to make it as useful as possible. To this end the doctrines of the residence and other qualifications and disqualifications of jurors need amendment. The principle of trial by a jury of the vicinage was founded originally in the idea that the neighbors were better qualified to decide the controversy, by reason of their knowledge of the character of the parties and the circumstances of the issues to be tried. In modern times we have adopted the rule to exclude a man from the jury who knows anything of the case, or has an opinion of its merits, searching in some instances for weeks to find a man so ignorant or obscure, that he has never heard of a case which has attracted universal attention, and does not know the most prominent public character in his neighborhood. The evils of these restrictions have challenged public attention of late years. I can see no reason at this day for a trial in the vicinage, nor for restricting the area from which the jury is to be taken by county lines, and still less for refusing a man otherwise well fitted for a juror, because he has read an account of the famous case in the newspapers. In these respects, as well as in the number of the jury, which is too large, and in the requirement of unanimity in the verdict in civil causes, there is a fair field for judicious legislation.

SOME RECENT FOREIGN DECISIONS.

PRINCIPAL AND AGENT—COMMISSION TO BE PAID "ON ANY MONEY RECEIVED."—*Fisher v. Drewitt.* English Court of Appeal, 27 W. R. 12.—The defendant agreed with the plaintiff in the following terms: "In the event of your procuring me £2,000, or such other as I shall accept, I agree to pay you a commission of two and a half per cent. on any money received." The plaintiff introduced the defendant to a building society who offered to advance him £1,620 on certain terms. This offer the defendant accepted, but as he declined to accede to certain requirements of the society the arrangement fell through and no money was advanced. *Held*, that the plaintiff was entitled to his commission on the sum which the society had agreed to advance.

COMPANY—CONTRACT—SYNDICATE—SALE TO COMPANY — CONCEALMENT — DIRECTORS RECEIVING QUALIFICATIONS FROM PROMOTERS—RIGHT TO RELIEF—DELAY—*Erlanger v. New Sombrero Phosphate Co.* English House of Lords, 27 W. R. 65. Certain persons forming a syndicate purchased for £55,000 from the liquidator of a company the lease of an island containing deposits of phosphate of lime, and a few days afterwards the agent of the syndicate signed a provisional contract for the resale of the island to a person described as a trustee for the N. Company, which was in course of formation, and was registered on the same day. The price to be paid for the property was £110,000, payable by £80,000 in cash on the completion of the contract, and £30,000 in fully paid-up shares of the company. The articles of the association of the company provided that the first directors should be five persons therein named, two of whom were to form a quorum, and authorized them to adopt the provisional contract. Two of the directors named were then abroad, a third was the agent of the syndicate who had signed the provisional contract, and a fourth obtained his share qualification from the leading member of the syndicate. On the 29th of September, 1871, a meeting was held which was attended by the three directors then in England and the solicitor who had acted both for the syndicate and for the company, and at which the provisional contract was adopted and a prospectus was approved. The prospectus mentioned the provisional contract, which recited the prior contract, but it did not state the price paid under the latter, nor the fact that the promoters of the company were the real vendors, and it also contained some inaccurate statements as to the value of the island. All the shares were afterwards allotted, and the purchase-money was paid. A meeting of the company was held on the 2d of February, 1872, which was attended by about sixty shareholders, and at which reference was made to the previous sale of the property for £55,000, and to the fact that one of the directors was both seller and buyer, but no resolution affecting either of these matters was proposed. The annual general meeting was held on the 29th of June, the prospects of the company having, in the interval, become depressed, and a resolution was passed to appoint a committee of investigation, and to adjourn the meeting. Another meeting was held on the 29th of August, when the committee presented their report, which recommended the removal of the directors and the taking of proceedings to recover the difference between the two prices. New directors were appointed, who were authorized to take such proceedings. Negotiations were opened with the members of the syndicate with a view to avoid litigation, but these proved abortive, and on the 24th of December a bill was filed on behalf of the company against the members of the syndicate. *Held*, that the sale to the company must be set aside, and the purchase-money refunded by the members of the syndicate; Lord Cairns, C., dub., on the ground that the company had been guilty of such laches as to disentitle themselves to relief. Judgment Court of Appeal (reported 25 W. R. 436, L. R. 5 Ch. D. 73; 4 Cent. L. J. 510), affirmed.

LIEN—INSURANCE BROKER—SUB-AGENT—MONTHLY DEBITS — PAYMENT TO INTERMEDIATE AGENT. —*Fisher v. Smith.* English House of Lords, 27 W. R. 113. The plaintiff was in the habit of employing S & Co., a firm of insurance brokers at Barrow, to effect policies of marine insurance on his behalf. They rendered him a monthly account of all sums due for premiums, which accounts he settled by giving bills at one month. S & Co. frequently employed the defendant, an insurance broker at Liverpool, to effect the insurance with the underwriters, the brokerage charges being shared between them. The defendant always retained the policies till payment of the premiums, but forwarded copies of them to S & Co. as soon as they were effected, and he also sent them on the first of each month a debit note of all money due in respect of premiums, the amount due for each month being settled on the 10th of the following month. Certain policies were effected for the plaintiff by the defendant, through the instrumentality of S & Co. The defendant knew that S & Co. were acting as brokers for the plaintiff, but the latter did not know, until the policies had been effected, that S & Co. had employed any other person in the business. The premiums were paid by the plaintiff to S & Co., who never paid over the money to the defendant. *Held*, that the defendant had a lien on the policies for the amount of the premiums, notwithstanding the plaintiff's payment to S & Co. Judgment of the Court of Appeal (reported 25 W. R. 719) affirmed.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MISSOURI.

October Term, 1878.

[Filed December 23, 1878.]

HON. T. A. SHERWOOD, Chief Justice.
" WM. B. NAPTON,
" WARWICK HOUGH,
" E. H. NORTON,
" JOHN W. HENRY,
} Judges.

EJECTMENT — ACTUAL ADVERSE POSSESSION OF ONE OF SEVERAL TRACTS OF LAND CONVEYED BY SAME DEED NOT SUFFICIENT TO BAR TITLE OF TRUE OWNER OF THE TRACT OF WHICH NO PART IS ACTUALLY POSSESSED BY CLAIMANT — ACTUAL POSSESSION OF VACANT UNENCLOSED LANDS.—This was an action of ejectment brought in December, 1875. It was conceded that plaintiff had the better title, and the only defense relied on was the statute of limitations. The 40 acres in dispute belonged in 1856 to Livingston county as swamp land, and was agreed to be conveyed to one Craig upon his payment of 80 per cent. of purchase-money, 20 per cent. of it having been paid at the date of sale. This title of Craig was assigned to plaintiff in 1860, and in 1866 plaintiff received a deed from county. In 1860, but subsequently to Craig's assignment to plaintiff, Craig conveyed his farm containing 651 acres, 600 of which was under fence, together with the 40 acre tract in dispute, to a trustee to secure certain debts, and upon a sale under this deed in 1864, defendant's father purchased the entire tract of 691 acres, and obtained a deed therefor, entered and took possession of the place in the spring of 1865,

and made use of the 40 acre tract to supply himself with rails and house logs, and watered his stock at a pond which was on it, and paid the taxes on it from 1864 to the trial. It appeared from the testimony that the land was unfit for cultivation, and could not be fenced up without risk of fences being washed off by high water. Plaintiff, about the time defendant thus took possession, notified him he owned the 40 acre tract in dispute. Judgment for defendant and plaintiff appeals. *Held*, 1. That defendant's actual occupancy of the farm of 651 acres under the deed conveying 691 acres did not necessarily defeat plaintiff's title to the 40 acres, although the 40 acres was included in the deed, if there was no adverse possession of any part of the 40 acres. McDonald v. Snyder, 27 Mo. 405; Griffith v. Schwenderman, Id. 412; Schultz v. Lindell, 30 Mo. 319; Taylor v. Lawdew, 33 Mo. 207. 2. As has been said in numerous cases in this State and elsewhere, adverse possession under the statute of limitations is a subject not susceptible of very definite explanation. It depends somewhat on the circumstances of each case, but the general rules which may be extracted from the multitude of cases on the subject seem to be sufficiently definite for the guidance of courts in their application to the variant features developed in each particular case as it arises. A fence, building or other improvement is not absolutely essential to constitute such adverse possession. Acts of ownership under a claim of right visible to the true owner are sufficient to authorize courts to find such possession, and the nature of these acts of ownership must depend upon the uses of which the land is capable. Draper v. Short, 25 Mo. 203; Fugate v. Pearce, 49 Mo. 441; Musick v. Barney, 49 Mo. 458; Turner v. Hall, 60 Mo. 289; Key v. Jennings, 66 Mo. 356. As the question of such adverse possession was submitted to the jury in this case under proper instructions, their verdict for defendant must be accepted as a proper conclusion from the evidence, and will not be disturbed. Affirmed. Opinion by NAPTON, J.—*Leper v. Baker.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

December Term, 1878.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

EVIDENCE—COUNTY TREASURER'S RECORD.—The statute requires a county treasurer to keep a record of the sales and redemptions. A certified copy of such record is competent evidence, but it is error to permit the county treasurer, without producing his books in court, to testify that he finds from an examination of his books, that a certain tax certificate has been redeemed. A record speaks for itself; and an officer in charge of a record may not, in the absence of the record, testify as to what the record contains and shows. Opinion by BREWER, J. Reversed. All the justices concurring.—*Downing v. Haxton.*

ELECTION CONTEST— REJECTION OF RETURNS.—While it is the duty of a court in a contest over an election, when satisfied that the returns from any precinct were falsely and fraudulently made, or that the ballots counted by the election officers were not the ballots actually cast by the voters, to reject the entire returns, yet it ought not to do so for any mere irregularities on the part of election officers, or any mere suspicion of wrong, nor unless the fact of wrong is clearly established by the testimony. Opinion by BREWER, J. Judgment for defendant. All the justices concurring. —*Jones v. Caldwell.*

PRIVATE CORPORATION ACT — FLOURING MILL—STOCKHOLDERS—SUBSCRIPTIONS.—1. Under section 5, of the act entitled "A act concerning private corporations," as amended in 1873, which provides for the creation of private corporations for "the conversion and disposal of agricultural products by means of mills, elevators, markets and stores, or otherwise," (Laws of 1873, pp. 137, 139, subdivision 36), a corporation may be created "to build and maintain a flouring mill." 2. Irregularities in adopting by-laws for a private corporation, or in the election of its officers, where all the stockholders and officers of such corporation recognize and treat such by-laws and such election as legal and valid, will not relieve a stockholder, who is afterwards sued by the corporation for the amount of his subscription to the capital stock of the corporation, from paying the amount of such subscription. 3. Neither will the fact that a corporation, created "to build and maintain a flouring mill," is expending its money in building a dam, by means of which to obtain power to run its mill, relieve a stockholder from paying the amount of his subscription to the capital stock of the corporation. Opinion by VALENTINE, J. Affirmed. All the justices concurring.—*Ginrich v. Patrons Mill Co.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF IOWA.

October Term (*Dubuque*), 1878.

HON. JAMES H. ROTHROCK, Chief Justice.
" WM. H. SEEVERS, } Associate Justices.
" JAMES G. DAY, }
" JOSEPH M. BECK, }
" AUSTIN ADAMS, }

ESTOPPEL—ACTS OF COUNTY OFFICER—SALE OF LAND FOR TAXES. — A county is not estopped by the acts of its officers done in violation of law; where land owned by a county, the title to which is not in dispute, is erroneously sold for taxes by its officers, the county is not estopped to claim title to the land as against its grantee in the tax deed. The land not being taxable, the acts of the officers in making the assessment, sale and deed are void for all purposes, and no estoppel can be created thereby. Opinion by BECK, J.—*Howard County v. Bullis.*

OCCUPYING CLAIMANT — RECOVERY OF RENT — MEASURE OF.—The occupying claimant of land whose title has been adjudged invalid, while he is not chargeable with rent upon the improvements made thereon by him, is required to pay, as the rental value of the premiums occupied, whatever the use of the land, as improved, is worth; the measure of recovery against him is not the rental value of the land as it was when he took possession, but the amount its use has been worth to him. Opinion by DAY, J.—*Wolcott v. Townsend.*

INTOXICATING LIQUORS — REPLEVIN FROM OFFICER—PRACTICE.—Actions for the seizure of intoxicating liquors under the statute are in the nature of criminal proceedings, and an action of replevin can not be maintained against an officer having possession of liquor so seized. Where such an action was erroneously entertained and the officer stipulated that judgment might be entered against him therein: *Held*, that such stipulation was without authority, and that

the attorneys of the officer might still except to the action of the court upon such stipulation and appeal therefrom, either in his name or that of the State, as the real party in interest. Opinion by DAY, J.—*Fries v. Porch.*

SALE—RIGHT OF PURCHASER TO RESCIND—WHEN IT MUST BE EXERCISED.—Action upon a promissory note. Defendants purchased goods of plaintiffs, and after their receipt executed the note in suit therefor; upon its maturity, six months thereafter, they refused payment, upon the ground that the goods were of an inferior quality, but tendered payment for the amount they had disposed of, and the return of the remainder. *Held*, that while defendants had a right to a rescission of the purchase by returning the goods if not of the quality ordered, such right must be exercised within a reasonable time, and could not be insisted upon after the execution of a note for the purchase-money and the lapse of six months thereafter. Opinion by BECK, J.—*Hirshorn v. Stewart.*

PRACTICE—WRIT OF ATTACHMENT—RIGHT TO AMEND.—The seal of the circuit instead of that of the district court was by mistake affixed to a writ of attachment, issued in an action in the latter court. Section 3021 of the code, relating to attachment suits, provides: "This chapter shall be liberally construed, and the plaintiffs, at any time when objection is made thereto, shall be permitted to amend any defect in the petition, affidavit, bond, writ or other proceeding." *Held*, that, upon motion of defendant to quash the writ, and release the attached property, the plaintiff had the right, under the above provision, to amend by having the proper seal affixed, and that, upon his so doing, the motion should have been denied. Opinion by SEEVERS, J.—*Murdough v. McPherrin.*

MORTGAGE—DEED WITH CONTRACT OF DEFEASANCE CONSTITUTES—JUDGMENT LIEN.—M deeded certain lands in fee simple to his attorneys in consideration of services rendered and to be rendered by them, they at the same time executing to him an agreement to reconvey the land if he should pay the amount found to be due for their services within a specified time thereafter. Nothing having been paid at the expiration of such time, plaintiff, one of the attorneys and the grantee of his partner's interest, brought this action to foreclose the rights of M in the land conveyed. L B & Co. intervened, claiming that a judgment obtained by them against the partner of the plaintiff before the transfer of his interest, was a lien upon the land. *Held*, that the deed and the contract for reconveyance being construed together, constituted a mortgage in favor of the grantees, requiring an action upon their part to divest the rights of M and perfect their title to the land, and that prior to such action their interest in the land was not one upon which a judgment would become a lien. Opinion by SEEVERS, J.—*Scott v. Newherier.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

November Term, 1878.

HON. GEORGE V. HOWK, Chief Justice.
" WILLIAM E. NIBLACK, }
" HORACE P. BIDDLE, } Associate Justices.
" JAMES L. WORDEN, }
" SAMUEL E. PERKINS, }

BILL OF SALE—WARRANTY BY INDORSEMENT.—A bill of sale for certain personal property was executed to appellant, by which the vendors "warranted the said property to be clear of all incumbrances," etc. Afterward the appellant executed the following writing, indorsed on the bill of sale: "I, Jackson Long, do hereby transfer the within property," etc., to the appellee, "property, and conditions and all, as above described," which writing was signed by appellant. *Held*, (HOWK, C. J., delivering the opinion of the court,) that the appellant expressly warranted the property in the same manner and to the same extent that it had been warranted to him in the bill of sale, and was bound to make good his warranty according to the letter and evident intent thereof.—*Long v. Anderson.*

REPLEVIN—DEMAND—FORMER ADJUDICATION.—This was an action of replevin to recover certain personal property mortgaged to appellee, to secure a promissory note. A similar suit had been brought before, and judgment rendered for appellant, because no demand had been made by appellee before the suit was brought. A demand was duly made before the bringing of the present suit. The defendant pleaded estoppel by the former adjudication, but the plaintiff had judgment in his favor. WORDEN, J.: If a demand was necessary, and the appellee was defeated in the former action for the want thereof, he is not estopped from maintaining this action. The action of replevin will not lie unless the goods were wrongfully taken or are unlawfully detained. It was stipulated in the mortgage in question that appellant was to retain possession of the property until the debt became due. The detention of the property after the debt became due was not unlawful until a demand was made for it, and an action of replevin to recover such property could not, therefore, be maintained without this action; and the former suit having failed for want of a demand, it constitutes no bar to this action.—*Roberts v. Norris.*

REFORMATION OF MORTGAGE—RIGHTS OF JUDGMENT-CREDITOR.—This was an action by William O'Brien to reform and foreclose a mortgage, executed by one James O'Brien, to the plaintiff. There were three tracts of land mentioned in the mortgage, one of which was described as the "southeast quarter," and it was alleged that the "south west quarter" was intended. The appellee was the owner by assignment of several judgments which had been rendered against the mortgagor after the execution of the mortgage. The question was whether the alleged mistake in the mortgage could be corrected as against the appellee, as the holder of such judgments, he having purchased them for a valuable consideration, without notice of the mistake in the mortgage. WORDEN, J.: This case has been in this court before, and the decision thereon is reported. 76 Ind. 284. It was then held that a mortgagee could not have his mortgage reformed and corrected as against the purchaser, in good faith for a valuable consideration, of a judgment which was a lien upon the land, which was intended to be, but, by mistake, was not embraced in the mortgage; the purchaser of the judgment having no notice of the mistake at the time of the purchase. This was cited approvingly in subsequent cases. 53 Ind. 499; 40 Geo. 535. It is true that such mistake may be corrected as against an original judgment-creditor. He did not acquire his lien by contract. He did not advance his money to acquire his lien. His lien is an incident attached by law to his judgment. 40 Geo. 535. Not so, however, with reference to one who purchases the judgment for a valuable consideration without notice of the mistake in the execution of the mortgage. He finds certain lands of the judgment-debtor, and embraced in the mortgage on which the judgment is a lien. On the faith of such lien, he advances his money and purchases the judgment. His equity is at least equal with that of the mortgage-creditor, through whose negligence, or that of those employed by him, the mistake has been brought about; and he has the law on his side, which makes the judgment a lien on the land of the judgment-defendant, subject only to the lien of the mortgage on such portion of the land as is embraced therein

1 Story Eq., sec. 64; 4 W. Va. 443. The fact that Flanders bought the judgment for fifty cents on the dollar does not show that he was not a purchaser for a valuable consideration, nor does it tend to show that he had any notice of the mistake in the mortgage. Judgment affirmed.— *Wainwright v. Flanders.*

BOOK NOTICES.

COMMENTARIES ON THE LAW OF BAILMENTS, with Illustrations from the Civil and the Foreign Law. By JOSEPH STORY, LL.D. Ninth Edition. Revised, Corrected and Enlarged by JAMES SCHOULER. Boston: Little, Brown & Co. 1878.

COMMENTARIES ON THE LAW OF PROMISSORY NOTES and Guaranties of Notes and Checks on Banks and Bankers, with occasional Illustrations from the Commercial Laws of the Nations of Continental Europe. By JOSEPH STORY, LL.D. Seventh Edition, by JOHN L. THORNDIKE, of the Boston Bar. Boston: Little, Brown & Co. 1878.

These two works are so familiar to the profession as to make a lengthy review of them superfluous. The American lawyer does not need to be told of the place which the works of Mr. Justice Story occupy in the literature of the law. Such information would be as unnecessary as it would be to instruct him concerning the authority of the opinions which the great jurist and teacher announced from his seat in the most august tribunal in the world. His treatise on Promissory Notes was published in 1845, while that on the Law of Bailments, founded on the wonderful essay of Sir William Jones, was given to the world some years earlier. The former has reached its seventh edition, and the latter its ninth edition. These works never grow old, for as the law changes from what it was in the author's day, additional notes are added in which all such alterations are noted, and such is their popularity that it is not too much too say that the legislatures and courts can not keep much ahead of them, and therefore the lawyer who has the last edition of these books in his library may be certain that he has the law as it stands.

We have not copies of the earlier editions of Story on Promissory Notes and Bailments, and consequently can not tell with accuracy the amount of matter added by the present editors. The work on Notes contains 747 pages, and that on Bailments 100 pages less. The editing has in each case been done with care and thoroughness, yet we would take the liberty of calling Mr. Thorndike's attention to an extremely misty sentence which appears with regularity in every edition, and which if he is again called upon to revise the work he may think it worth while to make clearer. It occurs in § 341, p. 460, which treats of written and oral notices, and is as follows: "It may be oral or verbal in all cases where it is made to the person who is to receive the notice; and it may be also oral or verbal when it is at his place of business. or at his dwelling-house; although in the latter cases it is most usually in writing. But when the notice is to be sent by the *post or other regular conveyance* and not by a special messenger, *there it seems indispensable that it should be in writing.*" The italics are our own, and we are only curious to know if the language is that of the author.

NOTES.

CALEB CUSHING, equally distinguished as a lawyer, diplomatist, judge and soldier, died on the 2d inst. at Newburyport, Mass. He was born in that State, and was graduated at Harvard College at the age of seventeen. Of his success as a lawyer we have only space to speak. He commenced practice in 1822. In 1852 he was appointed an associate justice of the Supreme Judicial Court of Massachusetts, but resigned a year later to accept the office of attorney-general of the United States, which he held for four years. In 1866 he was appointed one of the board to codify and revise the laws of the United States—a work of considerable responsibility and difficulty. He was one of the counsel for the United States at the Geneva Conference for settling the Alabama Claims. Dissatisfied with the course of Sir Alexander Cockburn, the British arbitrator, he criticised it severely in a volume published in 1873, called "The Treaty of Washington." Mr. Cushing was nominated in January, 1874, for the office of Chief Justice of the United States, but subsequently, and probably to prevent its rejection by the Senate, the nomination was withdrawn.——Charles T. Sherman, formerly a judge of the United States Court in Ohio, died suddenly on the 1st instant, at his home in Cleveland. He was a brother of General W. T. Sherman and the Secretary of the Treasury.——The charges against Judge Blodgett, of the United States District Court at Chicago, are to be brought to the attention of Congress at once.——There were in this country, during the year 1878, no less than ninety-six capital executions, nearly all for murder.

CHIEF JUSTICE RYAN, of the Supreme Court of Wisconsin, in concluding his opinion in the case of *Hanson v. Milwaukee, etc., Ins. Co.*, 4 N. W. Rep. 105, decided last month, spoke as follows in the name of the whole court, concerning the introduction of personalties in arguments before the court: "This opportunity is taken, although without relation to this cause, to remark with pain that sometimes, lately, during argument or in printed briefs, counsel have permitted themselves to indulge in personal criminations and recriminations toward each other. Such personalities are wholly out of place in court, irrelevant to judicial discussion, and disrespectful as well as painful to this court. Perhaps, in the present state of society, judicial controversy can not always be prevented from lapsing into personal irritation. But such irritations between members of the bar are properly personal, not professional; should never be permitted to interfere with the performance of professional duty—should never be intruded into court, to lower the dignity of the bar or offend the decorum of the court. This court is under great obligation to the learning, ability and zeal of its bar, upon which the intelligent discharge of its own duties so much depends. And it is as much out of consideration for the dignity of the bar, as for the dignity of the court, that these comments are made, by way of introduction to the rule which the court takes this occasion to establish. It is due, however, to the bar to say that the instances of which complaint is made have been comparatively few, though frequent enough to warrant what is now said. Hereafter no charge will be taxed for printing any brief disrespectful to this court, or to any member of it, or to the court below, or to opposing counsel. And, on motion, any brief so offending will be stricken from the files. Such motions, however, for obvious reasons, must be submitted without argument. The court will, on its own motion, exercise the same power in cases appearing to call for it. And on the hearing of causes at the bar, the chief justice or other presiding justice will peremptorily interrupt and prohibit, without appeal to the court and without discussion on the question, any argument disrespectful to this court or any member of it, or to the court below, or to other counsel. It is hoped that this announcement will be sufficient; and that offensive personalities, which have rarely appeared here, will entirely disappear, without putting the court to the pain of enforcing the rule."